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In *Lustig* v. *U. S.*[1] the Court had before it again the question of the admissibility of evidence obtained by a federal official participating without authority in a search by state officials. The principle of law to be applied was not in dispute but the problem was the application of the principle to this particular case. The detailed facts therefore are important. The facts were as follows: Federal Agent, Greene, got tips from the Cambden, New Jersey police and from the manager of a hotel there that two men in Room 402 were suspected of being engaged in violating the counterfeit laws of the United States. Greene went to the hotel, looked through the key hole of the door to the room, and saw Lustig in the room with some bags but saw nothing to indicate counterfeiting. He reported back to the police that he was confident "something was going on" in that room. In order to get in the room and find out what was going on the police got warrants for the arrest of the two men registered for that room on a charge of violating a local ordinance requiring "known criminals" to register with police within 24 hours after arriving in the city. They then entered the room in the absence of the occupants and searched it. They emptied the contents of the bags and dresser drawers on the bed, which consisted of counterfeiting equipment, and notified Greene who had waited at police headquarters "to see what they would find." When Greene was notified by the police of what they had found he came to the room and looked over the material. The occupants of the room returned and were arrested and searched by the state police officers. Greene kept some of the material found in the room and examined a $100 bill taken out of Lustig's pocket, but which was not used as evidence, in an effort to determine whether it had been used in

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[1] 338 U. S. 74 (1949).

connection with counterfeiting. Greene and the state officers took all the evidence to police headquarters and sorted it out, Greene keeping some of it. Some of what he kept had been given him in the hotel room. The material kept by him was used as evidence, over Lustig's protest, to convict him of counterfeiting. The validity of the lower court's ruling permitting the use of the evidence was the question before the Supreme Court.

Justice Frankfurter wrote the majority opinion reversing the lower court. He assumed that Greene was "not the moving force of the search, and that the search was not undertaken by the police to help enforcement of a federal law." "But," he said, "search is a functional, not merely a physical process" and is not "completed until effective appropriation, as part of an uninterrupted transaction, is made of illicitly obtained objects for subsequent proof of an offense." Greene's critical examination and selection of the evidence he wanted "was not severable, and therefore was part of the search carried on in that room." It could make no difference, he thought, whether the state officials found and turned over to Greene the evidence for examination or the agent himself took the articles out of the bags. The evidence showed, he continued, that Greene was called in before the search was completed, and "to differentiate between participation from the beginning of an illegal search and joining it before it had run its course, would be to draw too fine a line in the application of the prohibition of the Fourth Amendment as interpreted in *Byars* v. *U. S.* . . . The crux of that doctrine is that a search is a search by a federal official if he had a hand in it."[2] He concluded by saying that the search could not be defended as "incidental to a lawful arrest" because "Greene never made the arrest, and he knew that Lustig and Reynolds were not present"[3] when he entered the search.

Justice Reed wrote a dissenting opinion, in which Chief Justice Vinson and Justices Jackson and Burton concurred. He said that his understanding of the decision in the *Byars* case was that the government could use evidence "improperly seized by state officers operating entirely on their own account." He then pointed out that "the trial court found that Greene did not participate in the search and seizure," and thought "we should accept that

[2] *Id.* at 78.
[3] *Id.* at 79.

finding."[4] He said "it was not until after all the articles were found that were offered in evidence that agent Greene was called in." In support of that conclusion he quoted from the brief for Lustig that when Greene "arrived at the hotel, all the material that had been taken out of the brief case was on the bed." After examining the material Greene left the room and returned as Lustig and his companion were returning. The state officers arrested and searched them and took from Reynolds a $100 bill which Greene examined, but it was not used as "evidence against Lustig and has nothing to do with the case against him," Justice Reed said. "The search and seizure had run its course," he concluded, and "we should not hold that the appearance of a federal officer at the place of unlawful search and seizure after evidence has been found make him a participant in the act."[5]

The essential difference between the majority and the minority opinions is upon the degree of participation by federal officials without authority in a search by state officials that is necessary to make the evidence thus secured inadmissible in a federal court. On such nice questions of degree, turning inevitably on the philosophy of the Justices, do the constitutional right to privacy of the citizen depend. At any rate, according to this decision, participation by Federal officers without authority at any stage of a search by state authorities will vitiate the search as far as the Federal Courts are concerned.

On the same day that the foregoing case was decided, the Court decided *Wolfe* v. *Colorado*.[6] This case involved the question whether the due process clause of the 14th Amendment prohibited the use of evidence obtained in a prosecution in a state court, under circumstances that would make it inadmissible in a prosecution in a federal court because of the illegal search and seizure. The detailed facts of the case were not set forth, but merely the legal question that arose in the state court. Justice Frankfurter wrote the opinion of the Court. He began by pointing out that the Court had repeatedly held that the due process clause did not make the entire Bill of Rights applicable to the states and said the Court adhered to the view it took in *Palko* v. *Connecticut*[7]

[4] *Id.* at 81.
[5] *Id.* at 83.
[6] 338 U. S. 25 (1949).
[7] 302 U. S. 319 (1937).

that the term "due process of law" guaranteed to the citizen as against his state all that is "implicit in the concept of ordered liberty." The phrase "due process of law" he said "is the compendious expression for all those rights which the courts must enforce because they are basic to our free society."[8] These rights though were not static and the Court had wisely adopted the policy of working out the meaning of "due process of law" by a process of "inclusion and exclusion" rather than by attempting to fix its meaning once and for all. He continued:

> . . . the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is, therefore, implicit in the concept of ordered liberty and as such enforceable against the states through the due process clause. The knock at the door, whether by day or night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples. Accordingly we have no hesitation in saying that were a state affirmatively to sanction such incursion into privacy it would run counter to the guaranty of the Fourth Amendment.[9]

But the ways of enforcing such a basic right, he said, raised questions of a different order. He then pointed out that in the *Weeks* case in 1914 the Court ruled for the first time that evidence seized in violation of the Fourth Amendment was inadmissible in a federal court. This ruling was not based on any Congressional law or derived from "the explicit requirements" of the Amendment but "was a matter of judicial implication." To this ruling the Court stoutly adhered, he said. He then examined to what extent the ruling in the *Weeks* case was followed in the states and in Great Britain. He found that the states of this country were divided, some 30 rejecting the ruling and some 17 following it; while of ten jurisdictions within the British Commonwealth of nations that had passed on it none had followed it. After pointing out that in those jurisdictions which rejected the *Weeks* doctrine other remedies for an illegal search and seizure

[8] 338 U. S. 25, 27 (1949).
[9] *Id.* at 28.

were available, such as a suit in trespass against an offending officer, or criminal prosecution, he said, "Indeed the exclusion of evidence . . . directly serves only to protect those upon whose person or premises something incriminating has been found." He concluded, "we cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford. . . . It is not for this Court to condemn as falling below the minimal standards assured by the due process clause a state's reliance upon other methods which, if consistently enforced, would be equally effective."[10] He followed this by saying that there was more reason for applying the *Weeks* rule in a federal case because local opinion could better prevent oppressive police action than public opinion could with federal authority. He concluded by saying "We hold, therefore, that in a prosecution in a state court for a state crime the 14th Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." He then implied that Congress could possibly negate the *Weeks* rule, saying that if Congress attempted to do so "we would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend on our own."[11]

Justice Black wrote a brief concurring opinion in which he said he agreed "with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."[12] Justice Murphy wrote a dissent concurred in by Justice Rutledge. He said that there were three devices for enforcing the Fourth Amendment, that is, judicial exclusion of the evidence obtained in violation of it, criminal prosecution of violators, and civil action in trespass against violators. As to criminal prosecution of violators of the Amendment he thought it was unrealistic to "expect the District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the Dis-

[10] *Id.* at 31.
[11] *Id.* at 33.
[12] *Id.* at 40.

trict Attorney or his associates have ordered."[13] He made out a convincing case that a civil action in trespass in those states that did not follow the *Weeks* rule is no remedy at all. Some of these states limited damages to actual damage to physical property; where punitive damages were permitted, (and in some they are not permitted) the plaintiff had to show ill will or malice on the part of the officer. He then showed how in those states that follow the *Weeks* rule it had been made effective in the recruit training programs and in-service courses provided for enforcement officers. "The contrast between states with the federal rule and those without it," he said, "is thus a positive demonstration of its efficiency."[14] He concluded by saying "I cannot believe that we should decide due process questions by simply taking a poll of the rules in various jurisdictions, even if we follow the *Palko* "test" . . . even more important, perhaps, it must have tragic effect upon public respect for our judiciary. For the Court now allows what is indeed shabby business; lawlessness by officers of the law."[15] Justices Rutledge and Douglas each wrote brief separate dissenting opinions in which they agreed with Justice Murphy that the Fourth Amendment without the *Weeks* rule had no effective sanction. Justice Rutledge challenged Justice Frankfurter's implication that Congress could pass "legislation permitting the introduction in federal courts of evidence seized in violation of the Fourth Amendment." He thought that had been settled in the *Boyd* case in which the Court declared unconstitutional legislation which the Court considered had that effect.[16]

The various opinions have been summarized because it was felt that the importance of the decision justified getting all the opinions before the reader. It is believed too that the majority opinion is open to objections other than those presented by the dissenting members of the Court. The majority opinion said the principle of the Fourth Amendment "is basic to a free society," is implicit in the "concept of ordered liberty" and hence "enforceable against the states through the due process clause," that "were a state affirmatively to sanction such incursion into privacy it would run counter to the guaranty of the Fourth Amendment,"

[13] *Id.* at 42.
[14] *Id.* at 46.
[15] *Id.* at 46.
[16] *Id.* at 48.

but it followed these statements by saying "the 14th Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[17] These statements seem on their face to be directly contradictory. This seems to mean that although freedom from unreasonable searches and seizure is basic to a free society and is enforceable against the state through the 14th Amendment the Court will not act unless the state takes some affirmative action, presumably by legislative enactment. If this is what is meant it would still be necessary for the due process clause to be applied by the courts, chiefly the Supreme Court. And why should it be more willing to apply the due process clause when state legislation is involved than when the action of state courts, without affirmative legislation, is involved? How could a state more affirmatively sanction such incursion into the privacy of the individual than through its courts? When the courts of a state without such legislation admit evidence obtained by an unreasonable search and seizure they are presumably following the common law rule of refusing to look into the method by which relevant evidence has been obtained. If the admission of such evidence in a federal court is a violation of the Fourth Amendment as the Court had held in the *Weeks* case, and, as it said in the instant case, it would hold a violation of the due process clause of the 14th Amendment if affirmatively sanctioned by the state, why should it not so hold when the state courts admitted such evidence? State courts being agents of the state can certainly violate the due process clause as well as can a state legislature. The Supreme Court has repeatedly held that judicial and administrative agencies of the states can violate the 14th Amendment. As early as 1894 the Court said the prohibitions of the Amendment "extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities,"[18] and there have been numerous cases since that time in which the Court has held that state judicial procedure has violated the due process clause. For instance, in one case[19] the Court held that when a state court admitted as evidence confessions which had been obtained by physical torture, and conviction resulted, there was a denial of due

[17] *Id.* at 33.
[18] Scott v. McNeal, 154 U. S. 34 (1854).
[19] Brown v. Mississippi, 297 U. S. 278 (1936). Other cases are there cited.

process. Apparently the Court's refusal to apply the *Weeks* rule in this case was due to a lack of conviction that the Fourth Amendment made the *Weeks* rule mandatory and to a doubt as to the rule's soundness. There is no reason to believe that the Court in the *Weeks* case considered it "a judicially created rule of evidence" as Justice Black considered it. On the contrary the Court in that case said the "letters in question were taken from the house of the accused . . . in direct violation of the *constitutional* rights of the defendant." Justice Frankfurter said that whether "the right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime it would be excluded, as a matter of inherent reason . . . is an issue as to which men with complete devotion to the protection of the right of privacy might give different answers."[20] This is quite correct; but it is not so clear that if the Court is willing to pronounce a state law unconstitutional which authorized the use of such evidence it should not be willing to rule it unconstitutional when a state's courts admit such evidence as a matter of policy. It may be true also that it is wise policy for the Court to work out the meaning of "due process" by a process of inclusion and exclusion as cases arise, as he said, but it seems that this should be done on the basis of some guiding basic principles. Granted that the *Weeks* rule had not been followed in some states. That fact does not establish its unsoundness if the Court considered the protection of the individual's privacy as "basic to a free society."

The statement as to what the Court might do if Congress attempted to repeal the *Weeks'* rule seems to overlook the *Boyd* case, for in that case, decided prior to the *Weeks* case, Congress had acted in a way which the Court felt violated the Fourth Amendment and the Court declared the law unconstitutional.

Nor would Justice Frankfurter seem to be on sound ground in his statement that there were more imperative reasons for applying the *Weeks* rule as to federal invasion of the privacy of the individual because local public opinion would restrain local police. The contrary would seem to be the case. Local officials, it is submitted, are much more prone to disregard the principles of the

[20] 338 U. S. 25, 28 (1949).

Fourth Amendment, provisions of state constitutions to the contrary notwithstanding, than are federal officials.

The writer can close this analysis of the opinion in no better way than to use Justice Murphy's language at the opening of his dissent: "It is disheartening to find so much that is right in an opinion which seems . . . so fundamentally wrong."[21] It is especially disheartening to find the majority opinion from the pen of such an able and devoted friend of private rights as Justice Frankfurter has shown himself to be by his previous decisions.

In *Brinegar* v. *United States*[22] the Court had before it a question very similar to the one in the *Carroll* case. Brinegar was convicted for violating a federal law prohibiting the transportation of liquor from a state where the sale of liquor was legal into a state where its sale was forbidden. The facts were as follows: Two federal agents, Malsed and Creehan, were parked in their car in Oklahoma about six miles from the Missouri-Oklahoma border beside the highway leading from Joplin, Missouri, to Vinita, Oklahoma. The sale of liquor was legal in Missouri but was illegal in Oklahoma. Brinegar drove past the officers, headed west toward Vinita in his Ford coupe. Malsed had arrested him five months previously for the offense of transporting liquor illegally and an indictment was pending. He had also seen him on two occasions loading liquor in a car or truck in Joplin, Missouri and knew him to have a reputation for hauling liquor. Malsed recognized Brinegar and his car which seemed to be heavily loaded. The officers chased Brinegar at high speed for about a mile and as his car skided on a curve they sounded their siren, overtook him, and crowded his car off the road. The officers approached him and asked him how much liquor he had and he replied "not too much." After further questioning he admitted he had 12 cases in his car. They found one case in the front seat and twelve more hidden in the car. They seized the liquor and arrested him. This evidence was used to convict him although he challenged its use because the officers had no warrant of any kind. The officers justified their action on the ground that there was "probable cause" to search the car. The lower court held that prior to Brinegar's admission that he had 12 cases of liquor there

[21] 338 U. S. 25, 41 (1949).
[22] 338 U. S. 160 (1949).

was not probable cause but that his admission justified the search. The Circuit Court sustained that view. In neither of these courts was the *Carroll* case discussed, although in that case, it will be recalled, the Supreme Court had upheld the search of an automobile on "probable cause," but under a Congressional statute permitting such search. This had been defined as "facts and circumstances which warrant a man of reasonable caution in believing that a crime is being committed."[23]

The Supreme Court speaking through Justice Rutledge upheld the conviction. The opinion compared the facts in detail with those in the *Carroll* case and found that they were so similar in basic respects that the ruling in the *Carroll* case was controlling here. Justice Rutledge thought the decisions of the lower courts were erroneous in saying that there was no probable cause until Brinegar admitted he had 12 cases of liquor because the facts known to the officers prior to the admission were sufficient to establish probable cause.[24] The most important of these facts were: Malsed's knowledge that Brinegar had bought liquor in Joplin previously; that he had arrested him for the offense of hauling liquor illegally and an indictment was pending; that he recognized Brinegar, and also the car as one that he had seen Brinegar loading with liquor in Joplin in larger quantities than would be normal for personal consumption; and that Brinegar when observed was moving in the direction of Vinita, from Joplin which was geographically the logical source of supply of liquor for dry Oklahoma.

He then discussed the contention that at the trial hearsay evidence was used which was relied upon by the officers in making the search, but he insisted there was enough other evidence to sustain the officer's "conclusion concerning the illegal character of Brinegar's operations."[25] At the hearing on the preliminary motion to suppress the evidence obtained by the search, but not at the trial as to guilt, the judge admitted evidence that Malsed had arrested Brinegar for the same offense about five months previously. This it was argued was error and deprived the evidence as a whole of sufficiency to show probable cause. This contention

[23] Carroll v. U. S., 267 U. S. 132, 162 (1924).
[24] 338 U. S. 160, 171 (1949).
[25] *Id.* at 172.

Justice Rutledge said, "places a wholly unwarranted emphasis upon the criterion of admissibility in evidence to prove the accused's guilt, of the facts relied upon to show probable cause." He said, "there is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them." Guilt must be established, he said, "beyond a reasonable doubt"; while in establishing probable cause "we deal with probabilities," and "the standard of proof is accordingly correlative to what must be proved."[26] In trials to establish guilt therefore evidence of high probative value was often excluded because it might be misused or misunderstood by the jury. He felt, therefore, that the court was "neither inconsistent or improper" in admitting the evidence of previous arrest at the preliminary hearing and excluding it in the trial.

Justice Burton wrote a brief concurring opinion, and Justice Jackson for himself and Justices Frankfurter and Murphy wrote a dissent.

Justice Jackson after a statesmanlike prologue on the importance of protecting the privacy of the individual pointed out that there were two respects in which the Court's opinion extended the doctrine of the *Carroll* case. First, in the *Carroll* case a Congressional statute authorized the search of automobiles without a warrant, whereas in this case there was no such legislative authority; second, in the *Carroll* case the lower court had found probable cause and the Supreme Court sustained it, whereas in this case both lower courts had found no probable cause prior to the time Brinegar's car was forced off the road (which he thought was an illegal act) and the Court overruled the lower courts. He thought the cases differed also in that in the *Carroll* case the evidence on which probable cause was founded was not hearsay since the officers had previously actually bargained to buy whiskey from Carroll. The Court in that case had also taken judicial notice of the fact that Detroit was a center for illegally introducing liquor into the United States. In the present case he said, proof of guilt rested upon "inferences from two circumstances, neither one of which would be allowed to be proved at a trial. One, it appears that the same officers previously had arrested Brinegar on the same charge

[26] *Id.* at 175.

but there had been no conviction and it does not appear whether the circumstances . . . indicated any strong probability of it. In any event this evidence . . . would not be admissible. . . . As a second basis for inference the officers also say that Brinegar had the reputation of being a liquor runner."[27] (This latter would not be admissible unless an accused opened the subject up, he said.) He was "surprised that the Court is ready to rule that inadmissible evidence alone, as to vital facts without which other facts give little indication of guilt, establish probable cause as a matter of law."[28] The only other fact available he pointed out was that Malsed stated that on two other occasions he had seen Brinegar loading liquor in a truck in a Missouri town where liquor was legal. He thought the lower courts were correct in their ruling that there was no probable cause prior to the time when the officers ran Brinegar's car off the road. In doing that he said, "they were either taking the initial steps in arrest, search and seizure, or they were committing a completely lawless and unjustifiable act." When a car is forced off the road, he continued, as in this case "we think the officers are then in the position of one who has entered a home: the search at its commencement must be valid and cannot be saved by what it turns up,"[29] citing *Johnson* v. *U. S.* and *McDonald* v. *U. S.*[30]

Basic to the difference between the majority and the minority —the only difference aside from the evaluation of the facts—is the difference in regard to how probable cause should be established. Justice Rutledge would presumably admit any evidence of substantial probative value and apply the standard of a "reasonably prudent man;" Justice Jackson, while willing to admit evidence of probative value, would be unwilling to permit probable cause to be established entirely by evidence which would be inadmissible in a trial of guilt. This difference raises the question of whether or not the rules of evidence that are deemed to be sound in the trial of criminal cases should not also be considered sound in determining probable cause which is itself a legal conclusion. It will be recalled that in *Grau* v. *United States*[31] the Court in

[27] *Id.* at 186.
[28] *Id.* at 187.
[29] *Id.* at 188.
[30] See third installment of this article. 42 KY. L. J. 197, 226, 230 (1954).
[31] See second installment of this article. 41 KY. L. J. 388, 411 (1953).

considering a search under a warrant that was challenged as having been issued without probable cause, said "a search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury." It would seem that a search without a warrant should not be permitted on less reliable evidence. This statement was, however, as Justice Rutledge pointed out in a footnote,[32] dictum and although followed in lower federal courts the question of its application does not seem to have arisen in the Supreme Court until the instant case. It would now appear that it has no standing as an expression of the Court's opinion for here a search without a warrant is permitted by the Court on its own, that is, without Congressional authority as it had in the *Carroll* case, and on evidence inadmissible in a trial of guilt.

The case of *United States* v. *Rabinowitz*[33] presented a question almost identical with that in the *Harris* and *Trupiano* cases, in which the Court, it will be recalled, reached contrary results. Federal agents had a warrant for the arrest of Rabinowitz for selling four forged government stamps to a federal postal employee. He was a previous offender and the agents had reason to believe he had other counterfeit stamps in his small one-room office. They went to his office in daytime and arrested him and, without a search warrant, searched his desk, filing cabinet, and safe, and found 573 forged stamps. He was convicted of selling stamps and of having and concealing the others in his possession with intent to defraud. He made timely motion to suppress the evidence pertaining to the 573 stamps as having been obtained illegally. He was overruled in the District Court. This was reversed by the Circuit Court on the authority of the *Trupiano* case, since the officers had time to get a search warrant and had not done so.

Justice Minton wrote the rather brief majority opinion reversing the Circuit Court. He began by pointing out that the arrest was lawful, and that the Court had "often recognized that there was a permissible area of search beyond the person proper," citing the familiar dictum from the *Agnello* case. He then said that the right incident to lawful arrest to search "the premises where the arrest was made, which premises were under the control of the person arrested and where the crime was being com-

[32] 338 U. S. 160, 174 note 13.
[33] 339 U. S. 56 (1950).

mitted"[34] had become accepted, citing statements in the *Carroll, Boyd* and *Marron* cases. The *Marron* case he said had not been "drained of contemporary vitality" by the *Go-Bart* and *Lefkowitz* cases. The latter cases, he said, condemned "general exploratory searches" while ". . . in the instant case the search was not general or exploratory for whatever might be turned up. Specificity was the mark of the search and seizure here." He then made the interesting comment that: "There was *probable cause* to believe that respondent was conducting his business illegally."[35] He cited the *Harris* case as "ample authority for the more limited search here considered." He then summarized the various reasons why the District Court was correct in holding the search and seizure reasonable. These were: the search and seizure were incident to a lawful arrest, the place of the search was a business room to which the public including the officers were invited, the room was small and under the complete control of respondent, the search did not extend beyond the room used for unlawful purposes, and the possession of the forged stamps was a crime like the possession of burglar's tools.[36]

But, assuming the officers had time to secure a search warrant, he asked, were they bound to do so? He thought not because the search was otherwise "reasonable." "A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration," he continued, "but we cannot agree that this requirement should be crystallized into a sine qua non to the reasonableness of a search." The Fourth Amendment he concluded protected the people against "unreasonable searches" only, and it was not disputed that "there may be reasonable searches incident to an arrest." Having accepted that principle "it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant."[37] To the extent that the *Trupiano* case was contrary it was overruled, he said. He continued, "the relevant test is not whether it is reasonable to procure a search warrant but whether the search was reasonable. That criterion in turn depends upon

[34] *Id.* at 61.
[35] *Id.* at 63.
[36] *Id.* at 64.
[37] *Id.* at 65.

the facts and circumstances—the total atmosphere of the case." He closed with this assurance to the skeptical, "it is a sufficient precaution that law officers must justify their conduct before courts which have always been, and must be, jealous of the individual's right of privacy within the broad sweep of the Fourth Amendment."[38]

Justice Frankfurter again wrote a scholarly dissenting opinion, concurred in by Justice Jackson, repeating many of the things he had said in his dissents in *Davis* v. *United States* and *Harris* v. *United States*.[39] He began by pointing out that in passing on these questions "it makes all the difference in the world whether one approaches the Fourth Amendment as the Court approached it in *Boyd* v. *United States* . . . or approaches it as a provision dealing with a formality." The words of the Amendment he said "are not to be read as they might be read by a man who knows English but has no knowledge of the history that gave rise to the words." The Amendment "was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed unreasonable. Words must be read with the gloss of the experience of those who framed them."[40] It outlawed "unreasonable searches" and "then went on to define the very limited authority that even a warrant issued by a magistrate could give." Every search was regarded as unreasonable "unless a warrant authorizes it, barring only exceptions justified by absolute necessity." He insisted that the right to search and to arrest were distinct and separate and quoted Judge Learned Hand that to make the validity of a search " 'depend upon the presence of the party in the premises searched at the time of the arrest . . . would make crucial a circumstance that has no rational relevance to the purpose of the privilege. . . . The history of the two privileges is altogether different; the Fourth Amendment distinguished between them; and in statutes they have always been treated as depending upon separate conditions.' "[41] Justice Frankfurther then considered the necessities that permitted a search incident to an arrest. These were: first, to protect the officer making the arrest and to deprive the prisoner of the potential means of

[38] *Id.* at 66.
[39] See, third installment of this article. 42 KY. L. J. 197, 210-224 (1954).
[40] *Id.* at 70.
[41] *Id.* at 71.

escape, citing *Clossen* v. *Morrison;*[42] second, to prevent the destruction of evidence by the arrested person, citing *Reifsnyder* v. *Lee, Holker* v. *Heimessy;*[43] and third, to permit the search of moving vehicles, permitted in the *Carroll* case, where obtaining a warrant was impracticable. In the *Carroll* case though, he pointed out, the Court said, "In cases where the securing of a warrant is reasonably practicable, it must be used. . . . In cases where seizure is impossible except without a warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause."[44]

The first two of these principles, he said, permitted "the search of the person and those immediate physical surroundings which may fairly be deemed to be an extension of his person." This would permit the seizure of items properly subject to seizure which were in open view when the arrest was made but would not authorize a search for such items. He emphasized that the rights to search and to seize were very different, and an officer might have one right without the other.

He examined the contention of the Court's opinion that its major premise—that a lawful arrest gives the right to search the place of arrest—was supported by past decisions. He began with the *Weeks* case and showed that the passage in the opinion referred to did "not even refer to the right to search the place of arrest" but referred to the right "to search the person of the accused when arrested to discover and seize the fruits or evidences of crime" and the right to seize burglar's tools or other proofs of guilt found upon his arrest within the control of the accused." He then showed that in the *Carroll* case where the Court referred to the right on a lawful arrest of a person to seize "whatever is found upon his person or in his control which it is unlawful for him to have and which may be seized"[45] did not give the right to search the "place" where the arrest took place. These two statements from the *Weeks* and *Carroll* cases, he said "were uncritically expanded" into the dictum in the *Agnello* case. The decision in the *Marron* case was an application and an unsound extension of the *Agnello* dictum; but he insisted again, as in his dissent in the *Harris* case, that the *Marron* decision was drastically qualified in

[42] 47 N. H. 482 (1867).
[43] 44 Mo. 101 (1876); 141 Mo. 527 (1897).
[44] 339 U. S. 56, 73 (1950).
[45] *Id.* at 76.

the *Go-Bart* and *Lefkowitz* cases. His conclusion on this phase of the question was that: ". . . the right to search the place of arrest is an innovation based on confusion, without historic foundation, and made in the teeth of a historic protection against it."[46] He recognized that there was a problem of drawing a line around the right to search incident to arrest, that is, of distinguishing between a reasonable and unreasonable search, and that this was a question of degree. He pointed out how unsatisfactory it was to permit the search of part of a house, say one room and not more. In the place of Justice Minton's criterion of all the facts and circumstances—"the total atmosphere of the case" he suggested "the very restricted area that may fairly be deemed part of the person." Any other view would be taking the term "unreasonable" out of its context in the Amendment and making the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest. The purpose of the Fourth Amendment he concluded "was to assure that the existence of probable cause as to the legal basis for making a search was to be determined by a judicial officer before arrest not after, subject only to what is necessarily to be excepted from such requirement."[47] Since there was no suggestion that the officers did not have time to get a search warrant he felt that the decision of the majority overruling the *Trupiano* case overruled also the underlying principle of the *Di Re, Johnson,* and *McDonald* cases. This gave ground, he thought, for "the belief that law is the expression of chance—for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors."[47]

Justice Black wrote a brief separate dissent in which he agreed with Justice Frankfurter that the Court's decision cast doubt on a number of recent decisions, and although he repeated that he regarded the Weeks rule of excluding evidence obtained by an illegal search applied in the *Trupiano* case as a court-made rule of evidence, he thought "it would be wiser judicial policy to adhere to the Trupiano rule of evidence, at least long enough to see how it works."[48]

Here again the difference between the majority and minority opinions is a difference in point of view and in approach to the

[46] *Id.* at 80.
[47] *Id.* at 86.
[48] *Id.* at 67.

Fourth Amendment. As Justice Frankfurter pointed out what one gets out of the Fourth Amendment depends on what one puts into it, and to interpret it without regard to what it meant to the men who framed it, and to the generation for which they spoke is, to say the least, a questionable approach to a provision of the Constitution designed to limit governmental power in the interest of a basic principle. Aside from the confusion which Justice Frankfurter found in the majority opinion its soundness is questionable in other respects. Justice Minton here used "probable cause" as a guide to determine the right to search without a search warrant when a lawful arrest is made, or allowed the arresting officers to do so. This would not seem to be very different from allowing them to search without any kind of a warrant whenever they thought it was reasonable, and is, to say the least, a novel use of "probable cause." The term was used in the Fourth Amendment as a requirement for a magistrate to issue a warrant to search. Justice Minton's summary of the reason why the District Court was justified in holding the search legal seems also to represent some confusion. The first and most valid, yet questionable reason, was that it was incident to a lawful arrest. The second reason was that the place searched was a "business room to which the public including the officers was invited." What significance did this have? The same was true in a number of cases in which the Court had ruled against the search. Small offices were involved in the *Gouled, Go-Bart* and *Lefkowitz* cases. His third reason was that the room was small and under the complete control of the respondent. The same was true in the cases just mentioned. And in the light of the holding in the *Harris* case it did not matter that the room was small for that case held the officers could search an entire apartment; the fourth reason was that the search did not extend beyond the room used for unlawful purposes. Again, the *Harris* case would seem to make that consideration unimportant. The last argument was that the possession of the forged stamps was a crime, just as the possession of burglar's tools, lottery tickets, and counterfeit money. This fact would authorize the seizure of the stamps but it is difficult to see how it would justify an illegal search for them. If the search was illegal at the beginning what was found could not legalize it.[49]

[49] Byars v. U. S., 273 U. S. 28 (1927).

In fact the entire basis of the Court's opinion is questionable, for the basis is that all that is necessary to make a search legal is that it be reasonable under all the facts and circumstances—"the total atmosphere of the case." That would seem to partially "repeal" the Fourth Amendment. For why put in written form a constitutional provision requiring a search warrant if all that is necessary to make a search legal is that it be reasonable. Any number of factual situations might make it seem perfectly reasonable to search a suspect's house or office, but the Fourth Amendment requires that a judicial officer, not a policeman, pass on the matter of reasonableness before a search is made. In fact one of the chief purposes of a written constitution is to avoid leaving the wisdom of governmental action entirely to the reasonableness of those entrusted with power, thus to insure that this be a government of laws and not of men. He emphasized that the Fourth Amendment prohibited only "unreasonable" searches but, as the Court had emphasized in the *Boyd* case, the framers of the Amendment no doubt had in mind as unreasonable searches those under writs of assistance or general writs that were so general in form as to permit almost unlimited search. Hence they prohibited "unreasonable searches and seizure" and then specified that "no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the person or things to be seized." This was the view taken, it will be recalled, by the Massachusetts court in *Commonwealth* v. *Dana,*[50] and as is shown below, is supported by other evidence. To make the legality of a search depend upon "the total atmosphere of the case" is little guide at all and opens the way for the decision to be made by police officers in the first instance and perhaps the courts afterwards on the basis of every conceivable human emotion. It is difficult to believe that the men who framed the Amendment had any such thought in mind.

Another recent decision of the Court on the subject is *On Lee* v. *United States.*[51] In this case the petitioner was convicted on two counts of selling a pound of opium in violation of federal law and of conspiring to sell opium. Petitioner ran a laundry and one Chin Poy, an acquaintance and former employee, visited the laun-

[50] Commonwealth v. Dana, 2 Met. (Mass.) 328 (1841).
[51] 343 U. S. 747 (1952).

dry one day and engaged him in conversation in which petitioner made some incriminating statements. He did not know that Poy was at that time an undercover man for the Bureau of Narcotics. Poy was wired for sound, with a small microphone in his pocket and a small antenna running along his arm. Another agent, Lee, was on the sidewalk outside with a receiving set with which he could pick up the conversation inside the laundry. At the trial, agent Lee who had remained outside testified to the conversation in which petitioner had made the incriminating statements. Petitioner objected to the use of this evidence as having been obtained in violation of the Fourth Amendment, in violation of the Federal Communications Act prohibiting wire tapping,and argued also that it violated judicial fair play under federal law.

Justice Jackson wrote the majority opinion upholding conviction. The opinion began by saying that the Fourth Amendment had not been violated. Poy "entered a place of business with the consent, if not by the implied invitation, of the petitioner." He was not a trespasser, therefore, as had been argued before the Court. It was argued further that Poy's conduct after leaving the laundry vitiated the consent supposedly given by On Lee and made his entry a trespass ab initio. This could not be maintained, Justice Jackson said, because the Court had ruled in *McGuire* v. *United States* that trespass ab initio was a rule for liability in civil actions only. He also rejected petitioners argument that the entry was a trespass because obtained by fraud. "The rationale of the McGuire case rejects such fine-spun doctrine for exclusion of evidence,"[52] he said. He stated further that petitioner could not rely on cases involving search and seizure of tangible property such as papers, for "such decisions are inapposite in the field of mechanical or electronic devices designed to overhear or intercept conversations, at least where access to the listening post was not obtained by illegal methods."[53] Petitioner requested that the Court reconsider the question of rights under the Fourth Amendment in regard to overheard or intercepted conversations. Justice Jackson said this would not help petitioner for his case was not analogous to wire tapping. The use of the transmitter and receiver to overhear petitioner's indiscreet conversation with Poy had "the same effect on his privacy as if agent Lee had been eavesdropping out-

[52] *Id.* at 752. McGuire v. U. S., 273 U. S. 95 (1927).
[53] 343 U. S. 747, 753 (1952).

side an open window[54] which would not be illegal. The argument that the Communications Act had been violated was dismissed by saying that petitioner "was not sending messages to anybody or using a system of communication within the Act."

He then took up the argument that the Court should exclude the evidence as a method of disciplining federal officers, and explained that "in order that constitutional or statutory right may not be undetermined, this Court has on occasion evolved or adopted from the practice of other courts exclusionary rules of evidence going beyond the requirements of the constitutional or statutory provision." This was though a departure from the common law rule of not rejecting relevant evidence because it had been obtained illegally. Such departure had to be justified "by some strong social policy," he said. There had been no violation of the constitution here, and "exclusion of the evidence would have to be based on a policy which placed the penalizing of Chin Poy's breach of confidence above ordinary canons of relevancy," he continued. He recognized the questionable reputation of Poy but insisted that "no good reason of public policy occurs to us why the Government should be deprived of the benefit of On Lee's admissions because he made them to a confidante of shady character."[55] The trend in recent years, he said, had been toward leaving more matters to a jury's discretion and "the use of informers, accessories, accomplices, false friends, or any of the other betrayals which are dirty business may raise serious questions of credibility," but such matters could be handled by wide latitude in cross-examination of witnesses and by juries. He did not feel that the Government should "be arbitrarily penalized for the low morals of its informers." Disapproval of the conduct of Chin Poy "must not be thought to justify a social policy of the magnitude necessary to arbitrarily exclude otherwise relevant evidence"[56] he concluded.

Justice Black dissented in one paragraph saying that the Court in exercising its supervisory authority over criminal justice in the federal courts should hold that the District Court should have rejected the evidence.[57]

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[54] *Id.* at 754.
[55] *Id.* at 756.
[56] *Id.* at 757.
[57] *Id.* at 758.

Justice Douglas wrote a brief dissent in which he recanted his having joined earlier in the opinion in the *Goldman* case which refused to overrule the *Olmstead* decision upholding wiretapping. He had since come to the conclusion that the dissents in the *Olmstead* case were sound and that "the nature of the instrument that science or engineering develops is not important." "The controlling, the decisive factor is the invasion of privacy against the commands of the Fourth and Fifth Amendments," he thought. He concluded, "it is important to civil liberties that we pay more than lip service to the view that this manner of obtaining evidence against people is dirty business."[58]

Justice Frankfurter dissented for much the same reasons given by Justice Douglas. He said that ". . . of course, criminal prosecution is more than a game. But . . . it should not be a dirty game in which the 'dirty business' of criminals is outwitted by the 'dirty business' of law officers. The contrast between the morality professed by society and immorality practiced on its behalf makes for contempt of law."[59] He felt also that the *Olmstead* case should be overruled and quoted approvingly Justice Holmes' statement in that case that it was "a less evil that some criminals should escape than that the Government should play an ignoble part."

Justice Burton dissented in an opinion in which Justice Frankfurter joined. He maintained that the Fourth Amendment protected intangible as well as tangible things and that where and how evidence is obtained is the important thing. He thought that when Poy "without warrant and without petitioner's consent, took with him the concealed radio transmitter to which agent Lee's receiving set was tuned . . . that amounted to Poy surreptitiously bringing Lee with him," and that was equivalent to a federal officer without warrant or permission entering a house and overhearing conversations and reporting it. This he thought would be a violation of the Amendment. In this case he said "the words were picked up without warrant or consent within the constitutionally inviolate 'house' of a person entitled to protection there against unreasonable searches and seizures of his person, house, papers and effects."[60]

The division of the Court in this case was based largely upon

[58] *Id.* at 765.
[59] *Id.* at 759.
[60] *Id.* at 766.

a difference of opinion as to social policy. The majority was not convinced that considerations of policy justified it in departing from the common law rule of not inquiring into the method by which relevant evidence was obtained; it also applied the principle of interpretation used in the *Olmsted* case and held that the deceptive reporting of the accused's conversation was not a violation of the Fourth Amendment, there being no physical search.

Among the dissenters Justices Douglas, Frankfurter, and presumably Justice Black, felt that as a matter of public policy the evidence should be excluded because of the "dirty" methods used in obtaining it. They both believed also that the *Olmstead* case should be overruled. Justice Burton considered the fraudulent methods used in getting the evidence to be a violation of the Amendment.

The latest consideration of the Amendment by the Court is in the case of *Irvine* v. *California*.[61] The case called for a reconsideration of the rule of *Wolf* v. *Colorado*.[62] The basic facts were as follows: Irvine was convicted of violating the laws of California against gambling by having engaged in horse-race bookmaking. When arrested he had on his person a federal wagering tax stamp. This and other evidence from the office of the U. S. Collector of Revenue was admitted as evidence. In addition, the police in order to get evidence against Irvine had a key made to his house and during the absence of him and his family entered the house and installed a microphone in the hall, later moved it to the bedroom, and finally into a closet. It remained in the house for several weeks. A hole was bored in the roof and a wire run to a neighboring garage where the agents listened in on petitioner's conversations which were incriminating. He appealed his conviction to the Supreme Court on the ground, among others, that the latter evidence was obtained in violation of the Fourth Amendment as made applicable to the states by the due process clause of the 14th Amendment. Justice Jackson wrote the Court's opinion for himself, the Chief Justice, and Justices Reed and Minton. Justice Clark concurred in a separate opinion. The other four Justices dissented.

Justice Jackson began by disposing of two preliminary ques-

[61] — U. S. — (S. Ct. 1954).
[62] 338 U. S. 25 (1949).

tions, namely, that it was error to admit as evidence the record of compliance with federal tax requirements, and that the payment of the federal tax gave the petitioner a license to engage in this form of gambling. He said there was no substance in this argument because the federal tax records were not confidential or privileged but that the statute expressly made them public records and the law also expressly stated that the payment of the tax did not exempt one from any penalties imposed by local law.[63] He then took up the more serious question of the conduct of the officers in entering the accused's house. He pointed out that this was not a wire tapping case and hence there was no violation of the Federal Communications Act. He stated that, "Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government." "The decision in Wolf v. Colorado," he continued, "for the first time established that security of one's privacy against arbitrary intrusion by the police is embodied in the concept of due process found in the Fourteenth Amendment", but for reasons set forth in that opinion the Court had "declined to make the subsidiary procedural and evidentiary doctrines developed by the federal courts limitations on the states." Instead, the Court held in that case "that in a prosecution in a state court for a state crime the 14th Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[64] He admitted that "the Court and individual Justices had wavered considerably" as to the substantive rule governing federal searches in violations of the 4th Amendment. He distinguished the instant case from *Rochin* v. *California*[65] where the Court had held that the use of force by police to compel an accused to submit to a stomach pump was a denial of due process. In the latter case he said the Court avoided any mention of the *Wolf* case and obviously "thought that illegal search and seizure alone did not call for reversal." He then stated that although the opinion in the *Wolf* case was written in the abstract and did not reveal the detailed facts, "actually the search was offensive to the law in the same respect if not the same

[63] Irvine v. California, *supra* note 61.
[64] Irvine v. California, *supra* note 61.
[65] 342 U. S. 165 (1953).

degree as here." The argument he said had been advanced that even though it adhered to the Wolf ruling the Court ought to reverse here "because the invasion of privacy is more shocking, more offensive, than the one involved there." This, he refused to do, saying: "We think . . . that a distinction of the kind urged would leave the rule so indefinite that no state court could know what it should rule in order to keep its processes on solid constitutional grounds."[66] He thought that "the Wolf decision should not be overruled for the reasons so persuasively stated therein," and that the rule there laid down was controlling here. He closed by calling attention to the fact that if the police violated the rights of Irvine under the 14th Amendment as defined in the *Wolf* case the officers would be subject to prosecution under a federal civil rights statute, and thought the Clerk of the Court should bring this case to the attention of the Attorney-General.

Justice Clark wrote a short concurring opinion in which he said that if he had been on the Court when the *Wolf* case was decided he would have voted to apply the *Weeks* rule to the states; but since the Court was unwilling to do so then or now he felt the decision ought to be followed. He pointed out that of course the Court could sterilize the rule announced in the *Wolf* case by adopting a case-by-case approach to due process, but he felt that made "for such uncertainty and unpredictability that it would be impossible to foretell . . . just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arm of the Constitution."

Justice Black wrote a dissent, concurred in by Justice Douglas, in which he took the position that since the information in the hands of the Internal Revenue Collector was used against Irvine he was convicted on "evidence extorted from him by the Federal Government in violation of the Fifth Amendment." He quoted from *Ashcraft* v. *Tennessee*[67] that "the Constitution of the U. S. stands as a bar against the conviction of any individual in an American Court by means of a coerced confession."

Justice Frankfurter wrote a dissent, concurred in by Justice Burton. He argued for what amounted to a case-by-case method of determining the meaning of due process of law. He thought

[66] Irvine v. California, *supra* note 61.
[67] 322 U. S. 143 at 155 (1941).

the *Wolf* and *Rochin* cases represented the extremes of "the comprehending principle" of due process. The *Wolf* case rejected one absolute and the *Rochin* case another. "The judicial enforcement of the due process clause is the very antithesis of a Procrustean rule," he stated. He continued by saying that the basis for the decision here was laid down in the *Rochin* case in which the Court had said, "Regard for the requirements of the due process clause inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[68] He thought the mere absence of physical violence which was present in the *Rochin* case ought not prevent the Court reaching a similar result for there was here "a more powerful and offensive control over the Irvines' lives than a single limited physical trespass." "Surely," he thought, "the Court does not propose to announce a new absolute, namely, that even the most reprehensible means for securing a conviction will not taint a verdict so long as the body of the accused was not touched by state officials." He concluded that "In applying the due process clause judicial judgment is involved in an empiric process in the sense that results are not predetermined or mechanically ascertainable" . . . and that that was "a very different thing from conceiving the results as ad hoc decisions in the probrious sense of ad hoc." "Empiricism implies judgment" he said, "upon variant situations by the wisdom of experience," while "ad hocness in adjudications means treating a particular case by itself and not in relation to the meaning of a course of decisions and the guides they serve for the future."

Justice Douglas wrote a separate dissent in which he protested this decision as well as the rule of the *Wolf* case. The rule in the latter case he thought was "part of the deterioration which civil liberties have suffered in recent years." He thought the only effective way to prevent illegal searches and seizures was for the Court to apply the *Weeks* rule and exclude such evidence and that "this is the time and the occasion to do it."

The result of the case is therefore that the *Wolf* rule is still

[68] 342 U. S. at 169 quoting from Malinski v. U. S., 324 U. S. 401 at 416, 417.

adhered to as a matter of policy by four Justices including the new Chief Justice; it was accepted by Justice Clark reluctantly because a majority would not override it; and it was rejected as controlling in this case by the other four members of the Court. There are a number of interesting things about the case. In the first place if Justice Clark had refused to follow the *Wolf* rule, which he thought was bad, and had dissented here, there would have been a majority for excluding the evidence. This of course would not have changed the *Wolf* rule for Justice Frankfurter presumably would still follow it; but it would at least have prevented this additional application of it. It may well be, however, as Justice Clark suggested, that adhering to the rule may be the quickest way to bring about its reversal.

Another interesting aspect of the case is that Justice Frankfurter who wrote the opinion in the *Wolf* case, here differed so fully with Justice Jackson as to the use to be made of the rule. It is submitted that when two firm believers in the rule differ so much as to its use that fact helps to demonstrate the unsoundness of the rule. Justice Frankfurter's case-by-case rule of determining the meaning of due process, the complicated facts of many cases, and the slight variation in facts of cases to say nothing of the changing personnel of the Court, make this procedure rather feeble guidance to police officers and lower courts. If the doubt that Justice Jackson indicated he had that the *Weeks* rule had been effective is well founded it may well be due more to the uncertainty as to how the Court would apply it than to any unsoundness in the rule itself. And his suggestion that state officers could be prosecuted under federal statute for an infringement of a citizen's rights by the police, as Justice Douglas pointed out, holds out little hope. Even if the Department of Justice had the time, staff and interest to watch state police and prosecute them for such offenses, the practical problem of the police, as well as the Department of Justice, knowing just when the due process of law clause was being violated would no doubt be an insurmountable difficulty to any effective protection of the individual's rights by this method. It is submitted that the sooner the Court goes back to a vigorous application of the *Weeks* rule and overrules the *Wolf* case the better it will be for civil liberties and the easier it will be for courts and police. A case-by-case ap-

proach to the meaning of due process has its advantages and in a sense is the only approach to be used; but the decisions could and should, it seems, be based on some guiding and consistent principle so that police officers and lower courts will have some more ascertainable standard to follow. For example, if due process protects those rights regarded as fundamental in a system of "ordered liberty" and if freedom from unreasonable search and seizure is one of those rights, then it would seem that the securing of evidence by such methods should consistently be excluded, rather than for the exclusion or admission to be based on such matters as whether force or other methods so bad as to shock a majority of the Court have been used. Nor would it seem to matter whether an office or house is actually invaded and searched physically or whether the privacy of the individual is violated by tapping his telephone wires or installing a microphone in his office or house. As Justice Bradley said in the *Boyd* case, it is the violation of the indefeasible right of privacy that is important, not how the violation was made.

Conclusion

The decisions of the Supreme Court examined in the four installments of this study have dealt with one of the most important and difficult problems facing democratic governments everywhere, that is, the reconciling of the right of the individual to have his privacy respected and the need of enforcement officers to use methods in catching criminals that encroach upon this right. This problem was not so difficult in 1800 and did not become difficult so long as the country was living under the relatively simple conditions of an agricultural economy. It is significant that the *Boyd* case, the first case in which the Supreme Court interpreted the Fourth Amendment, was not decided until 1885. The period from 1875 to 1900 and even later has generally been recognized as a period during which there was a lag in the adjustment of our legal institutions to fit the needs of a technological and complex industrial society. In a sense, the Court has had to adjust the Fourth Amendment, framed for a simple society, to the needs of a complex one. It is almost inevitable that in doing so the Court and the individual Justices would waver some in their decisions, as Justice Jackson said in the *Irvine* case, they had.

In retrospect the total effect of the Court's decisions seems to be a contraction of the Fourth Amendment and a narrowing of the protection it was intended to furnish to the individual; but as to whether this has been done to a much greater degree than other rights of the individual have fallen before the growing functions of modern government, or to a greater degree than is sound, there is room for different opinions.

There are two respects in which it seems that the Court has been fundamentally in error in its interpretation of the Amendment. One of these respects is in connection with the use of modern instruments to invade an individual's privacy without a physical search. This error was committed originally in the *Olmstead* case which held that wire tapping was not a violation of the Fourth Amendment since there was no entrance into the office and a physical search. It was followed in later cases and applied most recently in *On Lee* v. *United States.* The latter was an aggravated case because the federal agent was a "shady" character and obtained the information by deception. The basic principle of the Amendment that the individual's privacy should be respected will be largely defeated under this decision by the use of modern means of picking up sound at a distance or by other scientific devices. Because a physical search was at the time the Amendment was drafted, the only practicable way to invade the privacy of the office or home does not mean that a physical search should always be required for a violation of the Amendment. That would seem to be confusing the principle and the process by which the principle was violated. The commerce clause set forth the principle that Congress could regulate interstate commerce but the Court has not insisted that commerce had to be carried on by the same process as in 1800 to enable Congress to regulate it. As a matter of fact the use of the same mechanical devices for amplifying sound and extending communications have been used by the Court in upholding the power of Congress in respect of telephones, telegraph, radio, etc. It was the principle involved that was considered important and also as Chief Justice Marshall once said, a recognition of the fact that it was a constitution to be interpreted; a constitution designed to endure for ages and to be adjusted to the changing crises of human affairs.

The second respect in which it seems the Court has erred is in

widening the area of search incident to an arrest, which can and does defeat to a considerable extent the purpose of the Amendment. The Court has repeatedly said in recent opinions that only "unreasonable" searches and seizures are prohibited by the Amendment. If therefore a search without a warrant can be justified as reasonable under all the circumstances—"the total atmosphere of the case" as Justice Minton said in the *Rabinowitz* case—it is not a violation of the Amendment. So far this approach has been restricted to a search incident to a lawful arrest, but there would seem to be no inherent reason why it should be so restricted. For, if a search of a man's office or apartment incidental to an arrest can be made whenever the Court considers it "reasonable" to do so then why not permit any "reasonable" search with or without a warrant? As Justice Minton said the officers must account to the courts. Thus the word "unreasonable" in the Amendment is used to restrict its scope. This, it is believed, is contrary to the intentions and expectations of the men who framed it and of the leaders of the period in which it was adopted. The real purpose was to prevent the search of a home or office except under a warrant issued by a magistrate.

The evidence that is available seems to indicate clearly that the framers never thought of the likelihood of officers searching a house as incident to arrest, and that they thought of unreasonable searches as those under general writs not isued according to the procedure laid down in the amendment, that is, on oath or affirmation, with a description of the place to be searched and the things to be seized. The records of the state constitutional conventions between 1776 and 1780 which adopted bills of rights containing provision similar to the Fourth Amendment are quite instructive. Seven of these states adopted the equivalent of the Fourth Amendment but those of three states served as models for the others. The provisions of those three therefore will be presented. The Virginia bill of rights of 1776 came first and provided that:

> A general warrant whereby an officer . . . may be commanded to search suspected place without evidence of a fact committed or to seize any person etc., are grievous and oppressive and ought not to be granted. . . .[69]

[69] For a full report on the origin of the Fourth Amendment, see Lasson's work cited in note 1, First Installment (1953) 41 KY. L. J. 196.

Pennsylvania came next, September 28, 1776, and provided that:

> The people have a right to hold themselves, their houses, papers, and possessions free from search and seizures, and *therefore* warrants without oaths or affirmation first made, affording a sufficient foundation for them . . . are contrary to that right, and ought not to be granted. (Emphasis added)

Massachusetts had the most complete statement. It provided:

> Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer . . . be not accompanied with a special designation of the person or objects of search, arrest, or seizure; and no warrant ought to be issued, but in cases, and with the formalities prescribed by the laws.

This provision was interpreted by the Supreme Court of Massachusetts in *Commonwealth* v. *Dana,* previously referred to, as making all searches and seizures without a warrant unreasonable.

When the federal bill of rights came before Congress, Madison who presented it proposed that what became the Fourth Amendment read as follows:

> The right of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

Madison's proposals were referred to a committee of eleven which recommended to Congress that it read as follows:

> The right of the people to be secured in their persons, houses, papers and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.

During a discussion in which it was pointed out that "secured" should be "secure," the Annals of Congress reported the following: "Mr. Benson objected to the words 'warrants issuing'. This declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore proposed to alter it so as to read

'and no warrant shall issue.' "[70] His motion was lost but he was made chairman of a committee of three to arrange the Amendments. When this committee reported his language was used and accepted. It will be observed therefore that as the proposed Amendment came from the committee of eleven the term "unreasonable searches and seizures" was not used although Madison had used them. As the committee of eleven worded the proposal the restrictions to be placed on the issuing of warrants was assumed to furnish the protection desired and would, it seems, indicate that warrants issued without these safeguards constituted what was deemed "unreasonable." Mr. Benson apparently felt that by using the term "unreasonable searches and seizures" followed by the words "and no warrant shall issue" without the safeguards, the Amendment was being made more inclusive. He felt presumably that warrants issued with all the safeguards included might still be unreasonable. In the light of the above evidence it would seem that when the Court permits a search of an office or a house without a search warrant because it regards the search as reasonable and on the theory that the Amendment prohibits only "unreasonable searches and seizures" it is using the term for the exact opposite of the purpose in adopting these words, that is, it is narrowing the scope of the Amendment rather than enlarging it. In addition it is greatly expanding the limited right, incident to a lawful arrest, to search the person arrested and to seize the evidence of or instruments of the crime that are in his open and immediate possession and physical control, and being used at the time of arrest.

The background of the Fourth Amendment indicates quite clearly, therefore, that it was intended to require a search warrant issued by a magistrate under numerous safeguards to make a search or seizure "reasonable." The principle embodied in the amendment was considered so important that our forefathers thought it should be put in writing so as to eliminate the possibility of unregulated searches being permitted because considered "reasonable". All powers of government *could* be left to the discretion of officials but this particular power was regarded as too important to be so left. Governments do not usually consider their actions unreasonable.

[70] Quoted at page 101 of Lasson.